BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
THE TELEPHONE CONSUMER PROTECTION ACT OF 1991	)	CC Docket No. 92-90

PETITION FOR CLARIFICATION AND RECONSIDERATION OF DIRECT MARKETING ASSOCIATION

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SUMMARY OF ARGUMENT

In general, the rules promulgated by the Commission to implement the requirements of the Telephone Consumer Protection Act appropriately harmonize the requirements and purposes of the TCPA with the use of the telephone as a legitimate, cost-effective marketing, and fundraising medium. The Direct Marketing Association ("DMA") seeks clarification with respect to four narrow matters. The issues on which we seek clarification or reconsideration and the DMA's position with respect to them may be summarized as follows:

(a) Disclosure Requirements. The regulation (section 64.1200(e)(2)(iv)) governing disclosure of information should be modified to make clear that, in the case of live operator calls, a telephone number or address is required only if requested by the consumer. Consumer should not have information imposed upon them that they do not want or, as existing customers, already have; and marketers should not be exposed to technical violations of the rules for failing to provide unwanted or unnecessary information.

(b) Calling Hours. By its terms, the rule permits a marketer to place telephone marketing calls in otherwise proscribed hours so long as the call is made with consumer's approval. This flexibility is consonant with the purposes of the TCPA and the precedents upon which the Commission has relied in developing its national calling hour standards. The Commission should confirm that the language and structure of the rule is consistent with the Commission's intent and that marketers may place calls to consumers

during otherwise proscribed hours with prior approval or request.

(c) Calls Made on Behalf of Tax-Exempt Organizations. The Commission has clearly and correctly articulated the policy that tax-exempt organizations are not subject to the requirements of the rule (§ 64.1200(e)) dealing with do-not-call lists and similar matters. However, the formal terms of the rule does not make clear that this policy applies with respect to calls made on behalf of tax-exempt organizations by their service agents and bureaus. The text of the rule should be amended to make clear that the exception for tax-exempt organizations applies to calls made on behalf of, as well as those made by, tax-exempt organizations.

(d) Retention of Do-Not-Call Lists. The Commission's policy determination -- addressed for the first time in the Report and Order -- that do-not-call lists must be retained on a permanent basis should be changed. The policy should require that such lists be retained for a minimum period of five years. Given the mobility of American society, the requirement of permanency would create unrealistic consumer expectations, defeat the legitimate interests of consumers who wish to receive or do not object to telephone marketing calls and impose unnecessary burdens upon marketers.

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The Direct Marketing Association ("DMA") believes that, for the most part, the rules the Commission has promulgated to implement the requirements of the Telephone Consumer Protection Act ("TCPA") appropriately harmonize the requirements and purposes of the TCPA with the use of the telephone as a legitimate, cost-effective marketing and fundraising medium. The basic regulatory option selected by the Commission is consumer friendly; it places responsibility for compliance where it properly belongs -- with the telephone marketer; and it affords marketers some flexibility in the framing of specific procedures and practices to assure that the dictates of the TCPA and the rules are satisfied without excessive cost or regulatory burden. In general, the rules protect legitimate consumer interests without undue impairment of legitimate business practices.

There are, however, four narrow matters as to which clarification or reexamination of the specific rules is required. In most cases, we seek clarification because the technical language of a

cases, we seek clarification because the technical language of a rule does not completely reflect the Commission's policy determination underlying it or because the rule is clearer than the explanation of it; in one instance, the Commission has made an explicit policy determination which closer examination will show to be unnecessarily broad.

In the discussion which follows, we explain why the narrow and modest changes to the rules we propose will serve the interests of consumers, marketers and therefore the public interest.

In the Case of Live Operator Calls, Marketers Should be Required to Supply Address or Telephone Number Upon Request

1. The DMA has no difficulty whatsoever with the content of the information that the Commission has required to be provided to consumers by its rules. See Section 64.1200(e)(2)(iv). The DMA's guidelines themselves require identity of the caller and the party on whose behalf the call is being made.[1/] We also agree that a telephone number or address at which the marketer can be reached should be supplied -- if the consumer wants it. However, the rule is written in unqualified terms; and it therefore implies that all of this information -- including an address or telephone number -- must be supplied as a part of each and every telephone solicitation call. This ignores the reality that consumers simply

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1/ The guideline requires telephone marketers to "promptly disclose the name of the sponsor, the name of the individual caller, and the primary purpose of the contact." Attachment A to Comments of Direct Marketing Association in CC Docket No. 92-90 at p. 2 (filed May 26, 1992).

do not want to be given an address or phone number in all cases.

2. Because live operator calls are, by their very nature, interactive, a consumer who wants a telephone number or address at which the marketer can be reached can readily obtain that information: he or she can request it at any time during the course of the telephone solicitation call.[2/] The experience of the members of the DMA is that some consumers do want a telephone number or address and will ask for it; that some consumers -- including those who request do-not-call status -- do not want a telephone number or address even if offered; and that many consumers do not want the information because, as existing customers, they already have it.

3. As written, the rule ignores consumer preferences and requires that a telephone number or address be supplied as a part of a live operator solicitation, even when the consumer already has the information, explicitly refuses it, or otherwise signifies that the he or she does not want it. This inflexibility is unnecessary to protect -- and, indeed intrudes upon -- consumer interests. The most basic objective of the TCPA and the Commission's rules is to

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2/ The situation is very different in the case of telephone solicitation calls made using artificial or pre-recorded voices. By definition, such calls are not interactive and the consumer therefore has no means of signifying his or her interest (or lack of interest) in the information. In the context of artificial or pre-recorded voice message calls, therefore, it is entirely appropriate for the Commission to require the disclosure of a telephone number (other than that of the pre-recorded message player) in all cases. But, here -- as elsewhere -- there is a basic distinction between live operator and artificial or pre-recorded message voice calls. That distinction must be reflected in the rule.

give consumers flexibility in their dealings with telephone marketers, to avoid forcing consumers to all-or-nothing choices, and to avoid annoyance. As presently framed, the rule defeats attainment of these objectives: it compels marketers to foist information onto consumers, restricting consumer choice and creating the potential for annoyance. The inflexibility of the rule also creates a compliance problem for marketers: technically, a marketer commits a violation of the rule if, for any reason, the marketer fails to deliver the information. To avoid absurd results, the rule will have to be applied in accordance with a "rule of reason" standard. Such a standard will necessarily be based upon whether or not the consumer sought or wanted the information. Since literal application of the rule cannot be achieved -- and is beyond the basic purposes of the TCPA -- the better practice is to clarify the rule so that marketers may know what is really expected of them and consumers are protected from needless annoyance.

4. The solution to this problem is simple and straightforward. The requirement that a marketer disclose the identity of the caller and of the marketer on whose behalf the call is made should be made mandatory in all cases. Because of the difference between live operator and artificial or pre-recorded message voice calls, the requirement that the marketer's telephone number be supplied as a part of all artificial or pre-recorded voice message calls should also be made mandatory in all cases. However, in the case of live operator calls, marketers should be affirmatively

required to supply a telephone number, address (or both) only if the consumer requests this information. This modest reformulation of the information disclosure requirement best serves the interest of consumers, marketers and the public interest.

If Requested or Approved in Advance by the Consumer, Telephone Solicitation Calls During Otherwise Proscribed Hours Should be Permitted

5. In its comments, the DMA opposed adoption of a national calling hour rule on grounds that, among other things, "acceptable" calling hours depend upon consumers' lifestyles which differ from region to region and within different demographic subsets of a community.[3/] Nonetheless, the Commission evidently concluded that a national calling hour standard would further the purposes of the TCPA. See, Section 64.1200 (e)(1). The DMA has elected not to re-argue the Commission's basic policy determination. Instead, we narrowly seek confirmation that, in accordance with its literal terms, the rule will permit telephone solicitation calls to be made in otherwise proscribed hours -- i.e., before 8:00 a.m. and after 9:00 p.m. local time -- upon prior consumer request or with prior consumer approval.

6. As written, the rule does permit marketers to make telephone solicitation calls during otherwise proscribed hours if previously requested or permitted by the consumer. The calling hour standard set forth in Section 64.1200(e) applies, by definition, only to a "telephone solicitation." Section

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3/ Comments of DMA in Docket 92-90 at page 30.

64.1200(f)(3) states that the term "telephone solicitation" does not include a message "to any person with that person's prior express invitation or permission." Thus, as a legal matter, a telephone marketing call made during otherwise proscribed hours with the prior request or approval of the consumer is not a "telephone solicitation" and is not subject to the national calling hour standard.[4/]

7. There is good reason for this regulatory flexibility. In a number of situations, consumers expect, want and request that telephone marketing calls be made to them during hours other than the 8:00 a.m. or 9:00 p.m. standard set forth in the Commission's rules. For example, it is not uncommon for consumers in rural and agricultural areas -- heavily dependent upon telephone marketing -- to request that telephone marketing calls be made to them typically before 8:00 a.m. In addition, many marketers offer programs that permit consumers to initiate a call to the marketer (typically on an 800 service) on a twenty-four hour a day basis; and consumers initiate calls at all hours of the day and night. In some of these programs, it is necessary for the marketer to call

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4/ As we noted in our original comments, it is also the case that a phone call made to a consumer with whom the marketer has an "established business relationship" does not constitute a "telephone solicitation" and is therefore technically not subject to the national calling hour standard. See, DMA Comments at 30, footnote 17. But, as we also pointed out -- and as the Commission agreed -- marketers placing calls to existing customers will, as a practical matter, respect the national calling hour standard unless they are requested by their own customers to call at an otherwise prohibited time. Thus, for purposes of the national calling hour rule adopted by the Commission, these two exemptions from the definition of the term "telephone solicitation" coalesce.

back to the consumer in order to supply additional information or to complete the transaction. Consumers who have initiated a call during "off-hours" often request or give approval (or, indeed, demand) that the return call be made as promptly as possible, without regard to the hour. As the rule is written, marketers would be able to accommodate the interests and expectations of these consumers without violation of the calling hour standards so long as they obtain the request, invitation or approval of the consumer to make such a call by means other than a call made during proscribed hours.

8. Although the text of the rule is clear, the Commission's explanation of its intended application is not. The Commission merely stated that "it is in the public interest to impose time of day restrictions on telephone solicitations." Report and Order in CC Docket 92-90 at 16, paragraph 26 (issued October 16, 1992). This statement leaves the impression that the Commission intended its national calling hour standards to be absolute and to override contrary expressions of consumer interest. We do not believe that this was the Commission's intent, in light of the structure and purposes of the TCPA, the Fair Debt Collection Practices Act (upon which the Commission has based its calling hour standard) and the policy considerations we have set forth above. It is thus only necessary for the Commission to confirm that the rule is structured as intended and that marketers may make calls during otherwise proscribed hours if they have the prior express approval or request of the consumer.

Telephone Solicitation Calls Made
on Behalf of, as Well as Those Made by,
Tax-Exempt Organizations Should be Exempt
From the Requirements of Section 64.1200(e)

9. The Commission's logic for determining the entity that is responsible for compliance with the requirements of its regulations is clear and sound: responsibility lies with the marketer. This means that a marketer who uses agents or service bureaus to carry out its telephone marketing programs must see to it that the service bureaus' activities accord with the requirements of TCPA. This logic follows accepted rules of law regarding principal-agent relationships. The same logic should apply to the one category of exempt marketers carved out by Congress from the TCPA -- tax-exempt organizations: once it is concluded that the marketer is exempt from the TCPA, it should make no difference whether the exempt call is made directly by the tax-exempt organization or on its behalf by a service agent. Clarification is necessary because the literal terms of the rules do not completely reflect these policy considerations.

10. The Commission's rules make clear that "no person" -- including tax-exempt organizations and their agents -- may make calls using automatic telephone dialing equipment or artificial or pre-recorded voices to emergency lines, telephone lines of guest rooms, and telephone numbers assigned to a service for which the called party is charged, except for emergency purposes or with the prior express consent of the called party. Section 64.1200(a)(1). The Commission's rules also make it clear that the prior express

consent of the called party is not required for pre-recorded message calls made by, "or on behalf of," a tax-exempt non-profit organization. Section 64.1200(a)(2); see, 64.1200(c). Following the logic of the TCPA and of the Commission's decision, this exemption applies whether the call is made by the tax-exempt organization itself or on its behalf by a service agent. However, when attention is turned to the application of Section 64.1200(e), which sets forth the do-not-call rules, an ambiguity arises: despite the core policies and logic of the TCPA, and despite the Commission's express statement that "tax-exempt organizations need not maintain do-not-call lists" (Report and Order in Docket 90-92 at 15, fn. 47), the rule itself speaks of an exemption only for calls made "by" the organization. That is, the language of the rule does not follow the policy underlying it because it does not expressly except calls made on behalf of a tax-exempt organization from the requirements of Section 64.1200(e). See, Section 64.1200(f)(3)(iii).

11. We recognize that the ambiguity embodied in the rule is largely a result of an ambiguity in the TCPA. The language of Section 64.1200(f) is identical to the language of Section 227(a)(3) of the Act; and the legislative history does not directly address the scope of the exemption Congress intended for tax-exempt organizations. However, the word "by," in the context of the statute, is ambiguous. It could literally refer only to those calls that are physically made a tax-exempt organization. Alternatively, it could refer to those calls for which the tax-

exempt organization is responsible and thereby include calls made "on behalf of" as well as those made directly by the tax-exempt organization.

12. The latter interpretation of the statute is plainly preferable. Under the structure of the TCPA and the logic of the rules, accountability rests with the entity that is ultimately responsible for initiating the telephone marketing program. This dictates that tax-exempt organizations are not required to maintain do-not-call lists for either calls they themselves make or that are made on their behalf by an agent. This construction of the term "by" also better serves the broad policy objectives that Congress apparently intended to achieve by creating the exemption: It is the message, not the messenger, that is intended to be excepted. See, Reilly v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988).

13. Lastly, and most importantly, the exemption for tax-exempt organizations must be read to include calls made on their behalf in order to avoid absurd results. Otherwise, for example, charities, religious groups and political organizations would be held accountable (and potentially liable) as principals for the acts of their agents, even though they would not be liable for the same activity if they had performed it themselves.

14. The basic obligation of the Commission, through the rulemaking process, is to harmonize the specific terms used by Congress in a statute with the core purposes of that statute. In enacting the TCPA, Congress expressed the view that although

consumers may find some tax exempt calls annoying and intrusive, those calls serve broader social purposes and should not be burdened with regulatory constraint. Given this fundamental expression of policy, there is no reason to conclude that Congress meant the legislative exception to apply only to calls made in-house. Accordingly, in order to harmonize the specific requirements of the regulatory regime with Congress's basic purposes, section 64.1200(f)(3)(iii) should be modified to make clear that calls made "on behalf of" as well as those made directly "by" tax-exempt organizations are not subject to the requirements of Section 64.1200(e).

Marketers Should Be Required To
Retain Names of Consumers Who Have Requested
Do-Not-Call Status On Their Lists For a
Reasonable Time, Not Less Than Five Years

15. The DMA freely acknowledges the Commission has made an explicit policy determination on the question of how long marketers should be required to retain the names of consumers who have requested do-not-call status. Although not directly reflected in the regulations themselves, the Commission has unequivocally stated that such names are to be retained "on a permanent basis." Report and Order and Docket CC 90-92 at 15. The Commission asserts that this policy is necessary so that consumers will not be burdened with "periodic calls to renew a do-not-call request." Id at 15-16. We think that this conclusion and its underlying rationale must be reconsidered. It is overly broad and inconsistent with legitimate interests of consumers and marketers.

16. It is certainly the case that marketers should not periodically re-canvass their do-not-call lists to determine whether the consumer wants do-not-call status maintained or renewed. At a practical level, this is not a significant problem: the purpose of telephone marketing calls is to promote and market the availability of goods and services, not to canvass consumers in order to determine whether they might be interested in receiving telephone marketing calls. As we have pointed out in our initial comments, many marketers maintain do-not-call practices and we know of none which has undertaken to call consumers who have previously requested do-not-call status in order to find out whether they have changed their minds. In any event, reasonable protection of consumers against the potential for this practice does not require that marketers maintain do-not-call lists of permanent duration.

17. The fundamental problem with the Commission's stated preference for retention of do-not-call names on a "permanent basis" is that it ignores the reality that the American public is highly mobile. The policy will, therefore, however inadvertently, defeat the expectations of consumers who do wish to receive telephone marketing calls while providing greater protection than is necessary for those who do not. As we pointed out in our initial comments,[5/] fifty percent of the American population moved between 1985 and 1990 and eighteen percent move every year. The useful life of a published telephone directory in an urban market

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5/ See, Comments of DMA in Docket 92-90 at 22 (filed May 26, 1992).

is about six months and approximately ten thousand telephone listings change in the country every day. As the Commission is well aware, when consumers move, telephone companies reuse their telephone numbers for new or moved consumers. For many marketers -- especially small companies -- the do-not-call list will consist of only name and telephone number. The operative information is the telephone number. These marketers have no means of knowing that a consumer who had requested do-not-call status is no longer to be found at "X" telephone number but, in fact, has now moved to an address with telephone number "Y", and that, in turn, a consumer who has had a longstanding, established and satisfactory business relationship with the marketer has now been assigned the "X" number. These problems may ultimately disappear when telephone-number-for-life programs become ubiquitous; but, at present, they are unavoidable realities.

18. Given the mobility of the American public, not to mention the ordinary mortality rates, a requirement that a do-not-call list be permanently maintained defeats consumer expectations in two respects. First, it will mislead consumers into believing that a do-not-call request is truly "permanent," even if they move or otherwise change their phone number. Second, and just as importantly, it will deny consumers who do want to receive telephone solicitation calls the opportunity to do so if they move or change their telephone number; the requirement of permanency will lead some marketers to conclude that the phone number is forever blocked.

19. The permanency requirement will also impose significant and needless burdens on marketers. In enacting the TCPA, the Congress itself recognized that a permanent do-not-call list is both impractical and contrary to legitimate consumer expectations. The private cause of action provisions of the TCPA permit a consumer who has received a telephone solicitation call in violation of the requirements of the Act to bring a lawsuit only if there have been violations "within any twelve-month period." See, Section 227(c)(5). We believe that the time limitation imposed by Congress was adopted precisely because Congress was aware of the mobility of American society, did not wish to falsely raise the expectations of do-not-call consumers and did not wish to defeat the interests of those who wish to receive telephone marketing calls and the marketers who serve them. Those states which have adopted do-not-call statutes similarly do not require permanent retention. See, S.C. Code Ann. § 16-17-445; Tex. Rev. Civ. Stat. Ann. Art. 1446C §§ 119, 120. It may well be within the Commission's power to specify the duration of do-not-call list retention and to impose time limits which are broader than those established by Congress. However, marketers should not needlessly be put to the expense and burden of maintaining lists which -- due only to the passage of time -- are unreliable because a substantial number of do-not-call requests cannot be honored and because the marketer is denied access to an equally substantial number of the marketers' own customers.

20. The DMA has suggested a minimum period of retention be five years. That is the retention period the DMA itself uses in conjunction with its Telephone Preference Service. It is our experience that such a retention period works quite well. Based upon the national statistics, after five years approximately fifty percent of the telephone numbers on any given do-not-call lists are inoperative in the sense that the consumer who requested do-not-call status no longer has that number. Such a policy thus provides reasonable protection to those consumers -- by all measures the overwhelming proportion of the American population -- who do wish to receive or do not object to receiving telephone marketing calls and who may have moved during the five-year interval. Such a limitation also provides reasonable protection to consumers who do not wish to receive such calls from a particular marketer: 50 percent of these consumers will have moved and will have need to renew their do-not-call status if they are again contacted by the marketer;[6/] and, even if the called party has not moved, during a five-year or longer interval the consumer may have changed his or her mind or the marketer may well be calling with respect to a product or service of which the consumer was not previously aware.

21. The question of the duration of name retention was not explicitly raised as an issue in the Notice of Proposed Rulemaking,

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6/ To the extent that the Commission deems it necessary, a minimum (but finite) duration policy of five years could be coupled with a policy that prohibits marketers from calling for the sole purpose of determining whether a consumer wishes to retain do-not-call status.

and the Commission has not had the opportunity to fully consider the implications of its policy. The policy has validity only in the very narrow sense that some consumers, having expressed a preference not to receive phone calls from a particular marketer, expect that the preference will be honored indefinitely. This expectation cannot be fully satisfied and therefore marketers should not be burdened with unrealistic and onerous list retention requirements. Accordingly, at least until such time as telephone numbers are ubiquitously assigned for life, marketers should be required, as a matter of policy, to retain names on their do-not-call lists for a reasonable period of time, not less than five years.

Respectfully submitted

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